96TH CONGRESS
2d Session

HOUSE OF REPRESENTATIVES

REPORT
No. 96-1411

PRIVACY PROTECTION ACT OF 1980

SEPTEMBER 26, 1980.—Ordered to be printed

Mr. KASTENMEIER, from the committee of conference, submitted the following

CONFERENCE REPORT

[To accompany S. 1790]

The committee of conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 1790) to limit governmental search and seizure of documentary materials possessed by persons, to provide a remedy for persons aggrieved by violations of the provisions of this Act, and for other purposes, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the Senate recede from its disagreement to the amendment of the House to the bill and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the House amendment, insert the following:

That this Act may be cited as the "Privacy Protection Act of 1980".

TITLE I—FIRST AMENDMENT PRIVACY PROTECTION

PART A—UNLAWFUL ACTS

SEC. 101. (a) Notwithstanding any other law, it shall be unlawful for a government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize any work product material possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce; but this provision shall not impair or affect the ability of any government officer or employee,

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pursuant to otherwise applicable law, to search for or seize such materials, if—

(1) there is probable cause to believe that the person possessing such materials has committed or is committing the criminal offense to which the materials relate: Provided however, That a government officer or employee may not search for or size such materials under the provisions of this paragraph if the offense to which the materials relate consists of the receipt, possession, communication, or withholding of such materials or the information contained therein (but such a search or seizure may be conducted under the provisions of this paragraph if the offense consists of the receipt, possession, or communication of information relating to the national defense, classified information, or restricted data under the provisions of section 793, 794, 797, or 798 of title 18, United States Code, or section 224, 225, or 227 of the Atomic Energy Act of 1954 (42 U.S.C. 2274, 2275, 2277), or section 4 of the Subversive Activities Control Act of 1950 (50 U.S.C. 783)); or

(2) there is reason to believe that the immediate seizure of such materials is necessary to prevent the death of, or serious bodily injury to, or a human being.

(b) Notwithstanding any other law, it shall be lawful for a government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize documentary materials, other than work product materials, possessed by a person in connection with a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce; but this provision shall not impair or affect the ability of any government officer or employee, pursuant to otherwise applicable law, to search for or seize such materials, if—

(1) there is probable cause to believe that the person possessing such materials has committed or is committing the criminal offense to which the materials relate: Provided, however, That a government officer or employee may not search for or seize such materials under the provisions of this paragraph if the offense to which the materials relate consists of the receipt, possession, communication, or withholding of such materials or the information contained therein (but such a search or seizure may be conducted under the provisions of this paragraph if the offense consists of the receipt, possession, or communication of information relating to the national defense, classified information, or restricted data under the provisions of section 793, 794, 797, or 798 of title 18, United States Code, or section 224, 225, or 227 of the Atomic Energy Act of 1954 (42 U.S.C. 2274, 2275, 2277), or section 4 of the Subversive Activities Control Act of 1950 (50 U.S.C. 783));

(2) there is reason to believe that the immediate seizure of such materials is necessary to prevent the death of, or serious bodily injury to, a human being;

(3) there is reason to believe that the giving of notice pursuant to a subpena duces tecum would result in the destruction, alteration, or concealment of such materials; or

(4) such materials have not been produced in response to a court order directing compliance with a subpena duces tecum, and—

(A) all appellate remedies have been exhausted; or

(B) there is reason to believe that the delay in an investigation or trial occasioned by further proceedings relating to the subpena would threaten the interests of justice.

(c) In the event a search warrant is sought pursuant to paragraph (4)(B) of subsection (b), the person possessing the materials shall be afforded adequate opportunity to submit an affidavit setting forth the basis for any contention that the materials sought are not subject to seizure.

PART B—REMEDIES, EXCEPTIONS, AND DEFINITIONS

SEC. 105. This Act shall not impair or affect the ability of a government officer or employee, pursuant to otherwise applicable law, to conduct searches and seizures at the borders of, or at international points of, entry into the United States in order to enforce the customs laws of the United States.

SEC. 106. (a) A person aggrieved by a search for or seizure of materials in violation of this Act shall have a civil cause of action for damages for such search or seizure—

(1) against the United States, against a State which has waived its sovereign immunity under the Constitution to a claim for damages resulting from a violation of this Act, or against any other governmental unit, all of which shall be liable for violations of this Act by their officers or employees while acting within the scope or under color of their office or employment; and

(2) against an officer or employee of a State who has violated this Act while acting within the scope or under color of his office or employment, if such State has not waived its sovereign immunity as provided in paragraph (1).

(b) It shall be a complete defense to a civil action brought under paragraph (2) of subsection (a) that the officer or employee had a reasonable good faith belief in the lawfulness of his conduct.

(c) The United States, a State, or any other governmental unit liable for violations of this Act under subsection (a)(1), may not assert as a defense to a claim arising under this Act the immunity of the officer or employee whose violation is complained of or his reasonable good faith belief in the lawfulness of his conduct, except that such a defense may be asserted if the violation complained of is that of a judicial officer.

(d) The remedy provided by subsection (a)(1) against the United States, a State, or any other governmental unit is exclusive of any other civil action or proceeding for conduct constituting a violation of this Act, against the officer or employee whose violation gave rise to the claim, or against the estate of such officer or employee.

(e) Evidence otherwise admissible in a proceeding shall not be excluded on the basis of a violation of this Act.

(f) A person having a cause of action under this section shall be entitled to recover actual damages but not less than liquidated damages of $1,000, and such reasonable attorneys' fees and other litigation costs reasonably incurred as the court, in its discretion,

may award: Provided, however, That the United States, a State, or any other governmental unit shall not be liable for interest prior to judgment.

(g) The Attorney General may settle a claim for damages brought against the United States under this section, and shall promulgate regulations to provide for the commencement of an administrative inquiry following a determination of a violation of this Act by an officer or employee of the United States and for the imposition of administrative sanctions against such officer or employee, if warranted.

(h) The district courts shall have original jurisdiction of all civil actions arising under this section.

SEC. 107. (a) "Documentary materials", as used in this Act, means materials upon which information is recorded, and includes, but is not limited to, written or printed materials, photographs, motion picture films, negatives, video tapes, audio tapes, and other mechanically, magnetically or electronically recorded cards, tapes, or discs, but does not include contraband or the fruits of a crime or things otherwise criminally possessed, or property designed or intended for use, or which is or has been used as, the means of committing a criminal offense.

(b) "Work product materials", as used in this Act, means materials, other than contraband or the fruits of a crime or things otherwise criminally possessed, or property designed or intended for use, or which is or has been used, as the means of committing a criminal offense, and—

(1) in anticipation of communicating such materials to the public, are prepared, produced, authored, or created, whether by the person in possession of the materials or by any other person;

(2) are possessed for the purposes of communicating such materials to the public; and

(3) include mental impressions, conclusions, opinions, or theories of the person who prepared, produced, authored, or created such material.

(c) "Any other governmental unit", as used in this Act, includes the district of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, and any local government, unit of local government, or any unit of State government.

SEC. 108. The provisions of this title shall become effective on January 1, 1981, except that insofar as such provisions are applicable to a State or any governmental unit other than the United States, the provisions of this title shall become effective one year from the date of enactment of this Act.

TITLE II—ATTORNEY GENERAL GUIDELINES

SEC. 201. (a) The Attorney General shall, within six months of date of enactment of this Act, issue guidelines for the procedures to be employed by any Federal officer or employee, in connection with the investigation or prosecution of an offense, to obtain documentary materials in the private possession of a person when the person is not reasonably believed to be a suspect in such offense or related by blood or marriage to such a suspect, and when the materials sought are not contraband or the fruits or instrumentalities of an offense. The Attorney General shall incorporate in such guidelines—

(1) a recognition of the personal privacy interests of the person in possession of such documentary materials;

(2) a requirement that the least intrusive method or means of obtaining such materials be used which do not substantially jeopardize the availability or usefulness of the materials sought to be obtained;

(3) a recognition of special concern for privacy interests in cases in which a search or seizure for such documents would intrude upon a known confidential relationship such as that which may exist between clergyman and parishioner; lawyer and client; or doctor and patient; and

(4) a requirement that an application for a warrant to conduct a search governed by this Title be approved by an attorney for the government, except that in an emergency situation the application may be approved by another appropriate supervisory official if within 24 hours of such emergency the appropriate United States Attorney is notified.

(b) The Attorney General shall collect and compile information on, and report annually to the Committees on the Judiciary of the Senate and the House of Representatives on the use of search warrants by Federal officers and employees for documentary materials described in subsection (a)(3).

SEC. 202. Guidelines issued by the Attorney General under this Title shall have the full force and effect of Department of Justice regulations and any violation of these guidelines shall make the employee or officer involved subject to appropriate administrative disciplinary action. However, an issue relating to the compliance, or the failure to comply, with guidelines issued pursuant to this Title may not be litigated, and a court may not entertain such an issue as the basis for the suppression or exclusion of evidence.

And the Senate agree to the same.

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HERBERT E. HARRIS,
LAMAR GUDGER,
TOM RAILSBACK,
HAROLD S. SAWYER,
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Managers on the Part of the House.

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ALAN SIMPSON,
Managers on the Part of the Senate.

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 1790) to limit governmental search and seizure of documentary materials possessed by persons, to provide a remedy for persons aggrieved by violations of the provisions of this act, and for other purposes, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The House amendment struck out all of the Senate bill after the enacting clause and inserted a substitute text.

The Senate recedes from its disagreement to the amendment of the House with an amendment which is a substitute for the Senate bill and the House amendment. The differences between the Senate bill, the House amendment, and the substitute agreed to in conference are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clarifying changes.

TITLE

The House amendment changed the title to delete the phrase, "engaged in first amendment activities" describing persons possessing documentary materials. This was done due to the ambiguous meaning of "first amendment activities" and the inclusion of guidelines in the bill recognizing the privacy interests of nonsuspect third parties. The Conference substitute adopts the House amendment.

REMEDIES

The House amendment replaced the section dealing with remedies to violations to this act. The Conference substitute adopts the Senate language with the exception of the provision which permits punitive damages in Sec. 106(f).

DOCUMENTARY MATERIALS DEFINITION

The House amendment changed the definition of documentary materials in Sec. 107 to include mechanically, magnetically or electronically recorded cards, tapes, or discs. The Conference substitute adopts the House amendment with the understanding that files which contain reporters notes and interviews are considered to be included to the extent that such files contain protected materials.

WORK PRODUCT MATERIALS DEFINITION

The Conference substitute adopts the Senate language. The definition of "work product materials" in section 107(b) is intended to

limit the protections in Section 101(a) to those documentary materials whose very creation arises out of the purpose of conveying information to the public and which involve some measure of original contribution on the part of the person whose intent is that the materials be disseminated to the public. The requirement that "work product materials" include the "mental impressions, conclusions, opinions, or theories" of such person borrows from a provision in Rule 26(b)(3) of the Federal Rules of Civil Procedure (General Provisions Governing Discovery). This provision emphasizes the mental processes employed by attorneys in creating their own "work product". While there is a specific exception in 107(b) for certain kinds of materials, such as contraband or the fruits of a crime, it is intended that the definition of "work product" is such that this evidence would rarely fall within this definition in any event.

Date of Enactment Clause

The House amendment contained no date of enactment clause. The Conference substitute adopts the Senate language, except it alters the date of enactment from October 1, 1980 to January 1, 1981. The enactment clause also states that provisions applicable to state and local governments will become effective one year after the date of enactment.

Title II

The House amendment included Attorney General Guidelines (Title II) in a slightly different form from the Senate bill. The differences in the House amendment included the fuller explanation of "privacy interests" in Sec. 201(a)(3), and a requirement that a U.S. Attorney approve an application for a warrant in most cases. The Conference substitute adopts the House amendment.

Four standards are established which must be incorporated in the development of the guidelines. Paragraph 1 of section 201(a) mandates a recognition of the personal privacy interests of the person possessing the materials sought. Paragraph 2 requires that the least intrusive means of obtaining the materials be employed which do not substantially jeopardize the availability or usefulness of the materials sought. The Committee expects these two standards to be translated into guidelines which will require an informal request or a subpoena wherever there is an opportunity for an effective alternative to search and seizure. In other words, the principal exception which would allow the use of a search warrant as oppposed to a request or a subpoena is where there is sufficient reason to believe that the documentary materials sought would be destroyed if a subpoena were to be issued, or when immediate seizure of the materials is required to prevent substantial reduction in their usefulnesss. Destruction of evidentary materials would be most likely to occur in those cases where a close, sympathetic relationship exists between the possessor of the materials and the suspect, or where the suspect holds some form of dominance over the possessor. This type of close relationship is most frequently found in marital or family settings, and therefore, establishes the basis

for the exclusion of those "related by blood or marriage to such a suspect" from the protections of the guidelines.

The third standard to be incorporated in guidelines as provided in paragraph 3 is a recognition of special concern for the privacy interests represented in a known, professional, confidential relationship, such as doctor-patient, attorney-client, or clergyman-parishioner. Testimony on Standard Daily legislation before the Committee convinced the members of the extreme sensitivity of the relationship, for example, between a psychiatrist and his or her patient, and the harm which can be done by an intrusive governmental seizure of confidential information, and police rummaging through confidential files. The reference to these three relationships in the statute is not intended to be an exclusive reference. Other important confidential relationships such as exist between psychologist and client, psychiatrist, social worker and client and psychiatric nurse and client shall be recognized. Further, it is the intent of Congress that the phrase "doctor-patient" be construed broadly to include all doctor-like therapeutic relationships.

The fourth standard to be incorporated in the guidelines is a specific requirement that any application for a warrant to conduct a search governed by this Title be approved by an Attorney for the Government. Only in rare and genuine emergencies could another appropriate supervisory official approve such an application and then only if within 24 hours of such emergency the appropriate U.S. Attorney is notified. If is the intent of Congress that an accurate and up-to-date record of any such emergencies be maintained.

The searches of those in privileged relationships which have been brought to the Committee's attention have all been executed at the state or local level. The Committee has been struck by the lack of definitive, federal data available in this sensitive area, however, and therefore in subsection (b) of section 201 has required the Attorney General to collect and compile information on the use of search warrants by federal officers or employees for documentary materials in the possession of those in professionally confidential relationships. These data are to be reported annually to the Judiciary Committees of the House and Senate acting in their oversight capacity over the Department. Section 202 provides that guidelines issued by the Attorney General shall have the full force and effect of Department of Justice regulations and that appropriate disciplinary action shall be fully initiated against any errant officer or employee. It is the view of Congress that the Office of Professional Responsibility of the Department of Justice shall be called upon to investigate and act upon any alleged violation of the guidelines developed pursuant to this act.

This section also provides that noncompliance with guidelines would not be litigable, and the evidence obtained through a violation of guidelines would not be subject to the exclusionary rule, and that the Federal courts would be without jurisdiction over any claim based solely on a failure to follow such guidelines.

Non-litigability provisions similar to subsection 201(c) are found in section 205 of S. 1722, the proposed revision of the federal criminal code, which sets forth factors to be considered in the exercise of concurrent federal jurisdiction, and in section 537a of S. 1612, the proposed FBI charter legislation.

Absent explicit language, it is arguable that judicial review of the adequacy of guidelines would be available under section 704 of the Administrative Procedures Act, 5 U.S.C. §704. However, the well-established "presumption of reviewability" of *Abbott Laboratories* v. *Gardner,* 387 U.S. 136 (1967) is subject to an exception under section 701(a) of the APA, i.e., where the "statute precludes judicial review".

Whether the exclusionary rule could be invoked absent the language of this section is debatable. The Supreme Court in *United States* v. *Caceres,* 440 U.S. 741 (1978) did not resolve the issue of whether the violation of regulations gives rise to the application of the exclusionary rule. Dicta in *Caceres* might be interpreted to allow exclusion of evidence if the violation of guidelines rises to the level of a statutory violation, but whether a defendant would have the requisite standing to invoke the rule for such a violation in the search of a third party without an explicit congressional authorization remains highly doubtful. In any case, the explicit language of subsection (c) forecloses such a possibility.

It was the position of the Department of Justice, in which the Committee concurred, that guidelines should not create the opportunity for litigation which would be both burdensome and unnecessary to achieve the purposes of the guidelines. Title II of S. 1790 will assure that the present practices, of restraint by federal officers in the area of third party searches, become an articulated Departmental policy, binding on all federal law enforcement officers. The Committee expects that under the guidelines any officer who violates the guidelines will be subject to disciplinary action by the Department, and that the Department will enforce the guidelines fully in good faith compliance with the policy toward third party searches that they express.

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